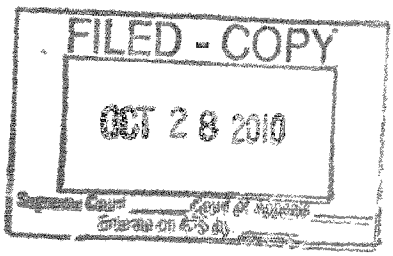
10-28-2010

Stem v. Prouty Respondent's Brief Dckt. 37641

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN STEM,	)	Supreme Court Docket No.
	)	37641-2010
Plaintiff- Appellant	)	
	)	Ada County District Court No.
vs.	)	2008-6177
	)	
CITY OF GARDEN CITY, IDAHO	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
WESLEY C. PROUTY,	)	
	)	
Defendant-Respondent.	)	



RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
for Ada County

Honorable Michael R. McLaughlin, District Judge, presiding

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STATEMENT OF THE CASE

Nature of the Case

This case involves a claim for personal injuries sustained by Plaintiff, John Stem (hereinafter referred to as "Stem") as a result of an accident occurring at 4684 Chinden Boulevard, Garden City, Idaho, on November 29, 2006. On that day, a forklift operated by a fellow employee of Stem tipped over as a result of being driven over a water meter cover that broke and pinned Stem underneath causing severe damage to his right leg, which was eventually amputated. Initially, Plaintiff sued the Defendant/Respondent Wesley C. Prouty (hereinafter referred to as "Prouty") under a theory of premises liability claiming that Prouty, as Stem's employer's landlord and property owner, was negligent in failing to warn Stem about the dangerous water meter cover and failing to maintain a reasonably safe premise for use of forklifts. The District Court granted Prouty summary judgment based upon a finding that Stem had not sufficiently established that Prouty either did know, or should have known through reasonable care, that the water meter cover which was the subject matter of this action was defective or that it presented a danger in an area where forklifts were being operated. The District Court specifically found that the record was "devoid" of any evidence that a visual inspection by Prouty would have revealed the water meter cover's load bearing capacity. The District Court also found that there was "no evidence" that if Prouty had inspected the cover prior to the accident he would have detected some sort of defect. The District Court further found that forklifts had been operated on the property in which the water meter cover rested for a number of years without incident or accident. In short, the District Court concluded, based upon the undisputed facts submitted, that Prouty neither knew, nor should he have known through

exercise of reasonable care, that the subject water meter cover was defective or presented a risk of injury.

Although the District Court granted Prouty summary judgment on Stem's negligence claims, the Court also allowed Stem to amend his complaint and allege a negligence *per se* claim against Prouty based upon Prouty's failure to obtain a building permit when he constructed a third overhead door in the building, in the portion occupied by Stem's employer's predecessor in interest, allowing for additional access to the building for loading and unloading material. In this regard, Stem claimed that if Prouty had obtained a building permit to put in the third overhead door, the City of Garden City would have required him to obtain a site inspection of the area in which the water meter cover was located. According to Stem, a site inspection ostensibly would have disclosed the fact that the water meter cover was inadequate for withstanding the weight of forklifts which would have necessitated that it be replaced, even though forklifts had been driving over the water meter cover for approximately 14 years with no incident.

The District Court initially denied Prouty summary judgment on the negligence *per se* claim finding that there was a genuine issue of material fact regarding whether Garden City would have required site engineering in conjunction with obtaining a building permit. However, on reconsideration, the District Court held that site engineering, *contra* to Stem's arguments, was a discretionary decision on the part of Garden City as part of the building permit process and, as such, concluded that site engineering was not a clearly defined statutory requirement or standard, especially in light of Garden City's admission that it would not have required site engineering if Prouty applied for a building permit to put in the third overhead door. Based on the aforesaid, the District Court granted Prouty's Motion for Summary Judgment on the negligence *per se*

claim, which resulted in dismissal of both of Stem's causes of action as set forth in the original, as well as second amended complaint. It is from these two ruling that Stem has taken this appeal. For the reasons argued herein, the appeal lacks merit.

Course of Proceedings

Prouty does not disagree with Stem's description of the course of proceedings in the District Court, as set forth at pages 2-5 of Appellant's Brief.

Statement of Facts

At pages 6-11 of Appellant's Brief, Stem sets forth what he believes to be the relevant facts in this case. In many respects, Prouty does not disagree with Stem's description. However, in his presentation, Stem has characterized as facts matters that have no evidentiary basis in the record, mischaracterized opinions as fact, and omitted a number of facts that had a direct bearing on the District Court's decisions regarding summary judgment.

Facts for which there is no evidentiary support

At page 7 of Stem's brief he states:

> The water meter lid that broke, which was owned by the City of Garden City, was only intended for light duty such as in a parking lot, and not in an area where forklifts weighing 6,000 to 10,000 pounds were used for loading and unloading trucks.

No qualified person has provided admissible evidence in this case as to who manufactured the water cover lid or as to its specific load bearing capacity. Several people, including Robert Ruhl, Garden City's Director of Public Works at the time of the accident, have surmised, guessed and conjectured as to the load bearing capacity for the lid, but no expert retained by Stem has ever examined the lid and rendered an admissible opinion as to its load bearing capacity. Moreover,

the claims presented by Stem have never been in the nature of *res ipsa.*

Statements of opinion mischaracterized as fact

At pages 10 and 11 of Stem's Statement of Facts, he refers to a number of statements by Robert Ruhl and characterizes those statements as statements of fact. However, the Trial Court, in its Memorandum Decision dated March 19, 2010, R.,Vol. VII, p. 1374, stated as follows:

> The central evidence the Plaintiff relies on is the opinion of his expert, Mark Hedge, and Robert Ruhl, Garden City's Director of Public Works. Mark Hedge opines the overhead door installation constituted a change of use and that Garden City would have required site engineering. Robert Ruhl opines that had there been a change of use, from a parking lot to a forklift loading zone, Garden City would have required site engineering. Neither of these opinions, both of which rest on the assumption that there was a change of use, changes the fact that the requirement of site engineering is not a clearly defined statutory requirement or standard.

(emphasis added)

Additional undisputed relevant facts

At page 8 of Stem's Statement of Facts he sets forth isolated portions of the depositions of Officer Compton and private investigator Lance Anderson. Officer Compton was specifically asked by Stem's attorney what he understood the reasoning behind not driving the forklift on the manhole covers was meant to imply. In response to that question, Officer Compton stated:

> You know, I think it would be – I would be guessing as to what his reasoning is. . .

R., Vol. II, p.310. Later on in the same deposition, when Officer Compton was asked whether or not Mr. Prouty expressed to him what his safety concern was in regard to telling his employees not to drive over manhole covers, he stated "No, not that I recall." R., Vol.II, p.311. In fact,

when asked whether or not that was just an assumption on his part (meaning Officer Compton) that Mr. Prouty was concerned about his employees' safety, Officer Compton responded "yes. R., Vol. II, p.311. Finally, in recounting his conversation with Mr. Prouty on the day of the accident, when asked whether or not Mr. Prouty ever indicated to him (Officer Compton) that he thought there was something specifically unsafe about one of the manhole covers, Officer Compton responded "no, he spoke in general terms of he tells them not to drive on the manhole covers not a specific one" R., Vol. II, p.311. When asked if he explored with Mr. Prouty the why of that statement, Officer Compton responded "no". R., Vol. II, p.311.

The only other purported statement of fact concerning comments by Mr. Prouty about the water meter covers is a quote from Plaintiff's investigator, Lance Anderson, found in the middle of page 8 of Plaintiff's Statement of Facts concerning his January 9, 2007 interview of Mr. Prouty, approximately 2 months after the accident, wherein Mr. Anderson wrote:

> He said nothing was ever mentioned on paper, but he has always told his forklift operators never to drive over them because he just didn't trust them.

During Mr. Anderson's deposition, he was specifically asked whether or not Mr. Prouty explained to him in the January 9, 2007 interview what he meant when he said he didn't "trust them" and Mr. Anderson replied:

> No, I tried to get him to expound on that, and he said that he was never personally aware of one breaking; he just didn't trust them.

R.,Vol. II, p.248.

Finally, Prouty, when asked during his deposition whether he thought the water meter cover involved in this accident was safe for the use in which his tenants (Stem's employer) were

using his property he said that he assumed that it was and that his only concern over any of the water meter covers was a six to nine inch depressed area around one of the covers (which was not involved in this action) because of the loading issues the depressed area presented. R., Vol. I, p. 80-83.

There is no dispute that the water meter cover involved in this case was not constructed by Prouty. R., Vol. I, p.79. In fact, the water meter cover in this case was owned and maintained by the City of Garden City. R.,Vol. 1, p.49. It was constructed prior to Prouty leasing the property in 1992 and his ultimate purchase of the property in 1994. The area where the water meter cover was located has been regularly used as a loading and unloading area since at least 1992, by trucks and forklifts. R., Vol. I, p. 86-87.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Stem believes the issues presented on appeal may be properly characterized as follows:

1. Was it proper for the District Court to grant the landowner summary judgment as to an invitee's claim of premises liability when the alleged dangerous condition (a) involved property owned and maintained by a third party even though located on the landlord's premises, (b) was not observable by the landowner, and (c) the landowner had no prior notice of the alleged dangerous condition?

2. Was it proper for the District Court to grant the defendant summary judgment as to the claim of negligence *per se* for violation of a building ordinance where it was claimed that site engineering was required as part of the building permit process, but neither the ordinance or applicable building code required site engineering, but left such a requirement to the discretion of the building official?

Stem makes no request for the award of attorney fees on appeal.

STANDARD OF REVIEW

In *Mackay v. Four Rivers Packing Company*, 145 Idaho 408, 179 P.3d 1064 (2008), this Court stated:

> On appeal from the grant of a motion for summary judgment, this court applies the same standard used by the district court originally ruling on the motion. *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 326, 48 P.3d 651, 655 (2002). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* at 327, 48 P.3d at 656 (citing Idaho R.Civ.P. 56(c). All disputed facts are to be construed liberally in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. *Id.* Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Id.*

Furthermore, in *Nelson, AIA v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990), this Court provided further explanation of the standard for review of summary judgment rulings when it said, at 118 Idaho 410:

> Additionally, "to withstand a motion for summary judgment, the [non-moving party's] case must be anchored in something more solid than speculation; a mere scintilla of evidence is not enough to create a genuine issue." *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986). It is not the judge's function to weigh evidence, "but to determine whether there is a genuine issue for trial . . . **[T]HERE IS NO ISSUE FOR TRIAL UNLESS THERE IS SUFFICIENT EVIDENCE FAVORING THE NON-MOVING PARTY FOR A JURY TO RETURN A VERDICT FOR THAT PARTY.**" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202, 209 (1986). **SUMMARY JUDGMENT SHOULD BE GRANTED IF THE EVIDENCE IN OPPOSITION TO THE MOTION "IS MERELY COLORABLE" OR "IS NOT SIGNIFICANTLY PROBATIVE."**

Id. (emphasis added). Prouty agrees with Stem that the standard of review involving claims of negligence *per se* which result from the violation of a specific requirement of law or ordinance is a question of law over which this Court exercises free review. *Obendorf v. Terra Hug Spray*

Company, Inc., 145 Idaho 892, 188 P.3d 834 (2008).

ARGUMENT

I. PROUTY DID NOT OWN THE WATER METER LID, HAD NO DUTY TO MAINTAIN IT, COULD NOT DETERMINE IT WAS A DANGER, AND HAD NO NOTICE IT PRESENTED A DANGER.

In order for Stem to prove that Prouty was negligent in failing to warn him of an alleged defective water meter lid or failing to maintain/replace the alleged defective water meter lid, Stem must prove: (1) Prouty had a duty to conform to a certain standard of conduct; (2) Prouty breached that duty; (3) there was a causal connection between Prouty's conduct and Stem's injuries; and (4) damages. *Orthman v. Idaho Power Co.,* 126 Idaho 960, 895 P.2d 561 (1995), *appeal after remand*, 130 Idaho 597, 994 P.2d 1360 (1997).

As the District Court correctly noted, Stem, as Plaintiff, has the burden of proof as to each of the elements of negligence set forth above. If Stem fails, as the evidence in this case so dictates, to make a showing sufficient to establish the existence of any one of the above four elements, Prouty was correctly entitled to summary judgment. See *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

A. A landowner's duty to persons injured on their land is determined by the status of the injured person.

The duty of a landowner to the person injured depends upon the status of the injured person. *Holzheimer v. Johannesen*, 125 Idaho 397, 871 P.2d 814 (1994). In Idaho, there are three categories of injured persons: (1) invitee; (2) licensee; and (3) trespasser. The District Court determined in this case Stem was an invitee for the reason that he was an employee of Prouty's lessee, Custom Rock Tops, who was injured on the premises leased by Custom Rock

Tops. See *Keller v. Holiday Inns, Inc.*, 107 Idaho 593, 691 P.2d 1208 (1984). Prouty has not appealed this determination.

A landowner's duty to an invitee is to keep the land in a reasonably safe condition and to warn of hidden or concealed dangers which the owner knows of, or should know of by the exercise of reasonable care. *Walton v. Potlatch Corp.*, 116 Idaho 892, 781 P.2d 229 (1989). The District Court, in applying the above standard, concluded that Stem did not submit evidence sufficient to establish the second element of his negligence claim that Prouty breached his duty of care as a property owner. In this regard, the District Court stated:

> The court will find that the plaintiff has not sufficiently established that Mr. Prouty did know or should have known through reasonable care that the water meter cover was defective or that the water meter cover presented a danger in the area where forklifts were being operated.

R., Vol. III, p. 460. The court further noted that:

> The record is devoid of any evidence that a visual inspection of the cover would have revealed the cover's load bearing capacity.

R., Vol. III, p. 460.

B. There is no evidence that Prouty breached his duty as a landlord to Stem's employer.

The evidence presented in this case via affidavit and deposition testimony, even viewed in a light most favorable to Stem, discloses the following:

(i) The water meter lid which is the subject matter of this action was in existence on the paved portion of Prouty's property between the leased building (which was occupied by Prouty and Custom Rock Tops) and Fenton Street at the time Prouty purchased the property located at 4688 Chinden Boulevard in 1994.

(ii) A visual inspection of the water meter lid does not disclose its load bearing capacity.

(iii) Prouty himself used the property upon which the water meter lid was located for loading and unloading product involved in his business with forklifts for many years before he leased a portion of the premises (4684 Chinden Boulevard) to Custom Rock Tops.

(iv) The water meter lids on the property were owned and maintained by Garden City. R., Vol. I, p.49. As such, Prouty had no reason to inspect or maintain the lids - they were not his.

(v) No facts were made known to Prouty indicating that the subject water meter lid could not withstand the weight of a forklift. Prouty's only concern with any water meter lids was with a depressed area around a water meter lid not even involved in this action, which explains why he mentioned a concern to Garden City Police Officer Compton in a casual conversation after the accident, wherein he indicated he had no concern over the tensile strength of the water meter lid that apparently failed. R., Vol. I, p.80-83.

In simple words, Prouty was never put on notice that there was anything dangerous about the subject water meter lid. Stem can point to no facts upon which it can be said that a reasonable person in Prouty's position could have or should have been alerted to the fact that there was something dangerously wrong with the water meter lids located on his property. To suggest that a property owner has some sort of duty to inspect the strength of water meter lids owned and maintained by a municipality simply because they are located on his property is to defy common sense and engage in rank conjecture and speculation.

In this case, Stem can only point to two facts that he argues creates some sort of inference that Prouty was placed on notice or had a concern about the ability of the water lid to withstand the weight of a forklift. According to Stem, the casual statement Prouty made to Officer Compton that he "tells his employees not to drive on the manhole covers," and the written statement by Stem's private investigator, Lance Anderson, reporting a conversation he had with Prouty two months later wherein Prouty apparently said "he has always told his forklift operators not to drive over them because he just didn't trust them," represent the universe of facts that Stem claims create an inference. Remarkably, neither Officer Compton or Stem's private investigator inquired of Prouty as to why he told his employees not to drive over the water lids or, for that matter, specifically which water lid he may have been referring to. In his deposition, Prouty confirmed that he had told employees of his company, Intermountain Interiors, not to drive across one of the water meter covers in the loading area because of a six to nine inch depression surrounding that particular cover (which was not involved in this accident) that caused Prouty to be concerned about loading issues. Stem would like the trier of fact to "speculate" as to other reasons that Prouty may have told his employees not to drive over water lid covers without presenting any evidence whatsoever as to what those other reasons might be. The District Court correctly held that:

> A mere scintilla of evidence will not withstand summary judgment. Mr. Prouty testified as to the reason he warned his own employees, namely, a depression in the ground next to the cover. The court will not now speculate as to other reasons for Mr. Prouty's caution. Mr. Prouty's concern about a depression by the cover next to Intermountain Interiors does not present a genuine issue of material fact regarding whether he knew or should have known about a defective cover next to Custom Rock Tops.

R., Vol. III, p.462 (emphasis added).

Intermountain Interiors, Prouty's business, and Custom Rock Tops operated out of the same building, but in different physical locations. The depression around the water meter cover that Mr. Prouty was concerned about had absolutely nothing to do with the accident which is the subject of this litigation.

Based on the undisputed fact that Garden City owned and maintained the water meter lid which is the subject matter of this action, based on the undisputed fact that forklifts had been driven over the water meter lid for more than 12 years prior to this accident with no incident, and based on the undisputed fact that a visual inspection of the water meter lid would not disclose its load bearing capacity, the only way a rational jury could conclude that Prouty either had knowledge of, or should have had knowledge of, or should have inspected the water meter lid for some unknown reason that would therefore constitute a breach of duty would be to engage in pure conjecture and speculation, which the District Court would not permit and neither should this Court.

II. THERE IS NO EVIDENCE SITE ENGINEERING WAS CLEARLY REQUIRED BY STATUTE OR ORDINANCE TO OBTAIN A BUILDING PERMIT; IT WAS A MATTER OF PROFESSIONAL DISCRETION.

Stem contends that Prouty is liable for negligence *per se* by failing to apply for a building permit when he contracted to have a third overhead door installed in the building in 1994 as required by Idaho Code § 39-4111. Stem then argues that had Prouty applied for a building permit site engineering would have been required and, had this been done, the defective water meter cover would have been discovered. The District Court, after reviewing the relevant statute, ordinances and provisions of the Uniform Building Code concluded:

> Although the Plaintiff couches the requirement of site engineering in terms of proximate cause, the Plaintiff is ultimately seeking to hold the Defendant accountable for not obtaining site engineering. It is that omission that allegedly caused the accident some twelve years after the overhead door was installed. But, in order to replace the common law reasonableness standard with a statutorily defined standard of conduct under negligence *per se*, the requirement of site engineering must be clearly defined in the statute or ordinance. See *Ahles,* 136 Idaho at 395, 34 P.3d at 1078.

R., Vol. III, p. 1384.

A. Criteria for establishing negligence *per se.*

In *Ahles v. Tabor*, 136 Idaho 393, 34 P.3d 1076 (2001), this Court enumerated several criteria which need to be met before negligence *per se* can be found citing *Sanchez v. Gailey*, 112 Idaho 609, 733 P.2d 1234 (1986). As enumerated by this Court, the statute must (1) clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect, and (4) the violation must have been the proximate cause of the injury.

In order to succeed in a negligence *per se* claim based upon a statutory violation, as Stem does in this case, the statute or regulation must clearly define the required standard of conduct. It only makes sense that Prouty should be clearly made aware of a requirement that he willingly is to have violated prior to committing the alleged violation. In this case, the requirement is site engineering when applying for a building permit to install an overhead door in a structure.

B. Stem can cite no statute, ordinance or provision of the Uniform Building Code that requires site engineering when obtaining a building permit to put in an overhead door, nor did the City of Garden City require site engineering as a condition for obtaining a building permit to install an overhead door in 1994.

As stated above, in the District Court's Memorandum Decision of March 19, 2010, R., Vol. VII, p. 1374, the trial court examined Garden City Code § 6-2-9; § 6-2-17; Idaho Code § 39-4111 and the 1994 Uniform Building Code, Sections 106.1, 106.3, 106.3.1 and 106.3.2, and concluded that none of the above-referenced statutes, ordinances or code required site engineering as a condition for obtaining a building permit for an overhead door. Additionally, the City of Garden City, in responding to a request for admission served upon it in this case stated:

> A building permit would have been required to install an overhead door in 1994. Defendant City of Garden City, Idaho's role in issuing the building permit, is not to determine whether site engineering was required under the applicable Uniform Building Code. The extent to which site engineering is required to safely design for the installation of an overhead door is a matter of engineering judgment. Defendant City of Garden City, Idaho did not specifically require site engineering to issue a building permit.

R., Vol. IV, p. 647. Based upon the City of Garden City's discovery responses, together with a review of the applicable statutes, ordinances and provisions of the 1994 Uniform Building Code, it is clear that site engineering was not a requirement for the building permit Prouty would have obtained for the overhead door and, as such, the opinions of Mark Hedge, Stem's engineering expert, and Robert Ruhl, Garden City's Director of Public Works, as the District Court noted, do not alter the fact that site engineering was not a clearly defined statutory requirement or standard and, as such, Prouty was entitled to summary judgment on the negligence *per se* claim. While it may have been Mr. Hedge and Mr. Ruhl's interpretation that under some circumstances site

engineering may be required, a requirement derived from interpreting various statutes is a far cry from clearly defining a required standard of conduct which is an integral element to a claim of negligence *per se*.

C. Stem misstates Robert Ruhl's testimony.

At page 29 of Stem's brief, he claims based upon deposition testimony of Robert E. Ruhl, Garden City's Director of Public Works, that "had a building permit been sought for the additional door, the engineer who stamped the plan would have made sure that appropriate water meter lids were placed in the loading and unloading area." Appellant's Brief, p. 29. In addition to being misleading and disingenuous, it is an incomplete statement of Mr. Ruhl's testimony. The actual testimony found in R., Vol. II, p. 273, in response to Stem's inaccurate hypothetical question assuming that the area was at one time a parking lot, is as follows:

> Q. Am I understanding your answer to say that had a building permit been applied for in '97 indicating that what was once parking lot is now going to be used to drive hysters across it, that the engineer assigned to that would have made sure that the appropriate water meter lids were placed for the new use of that property?
>
> A. That is correct.
>
> MR. REID: Object to the form.

Putting aside the objectionable nature of the question, as it assumes a number of facts which are not present in this case, the response by Mr. Ruhl is nothing more than pure abject conjecture in light of the undisputed admission by Garden City that the issue of site engineering is a matter of "engineering judgment."

As admitted by Stem at page 7 of Appellant's Brief, forklifts were regularly used to load and unload trucks in the area both prior to and after the installation of the third overhead door.

R., Vol. V, p. 990-994. As such, the installation of the third overhead door in the building in 1994, whether with or without a building permit, did not change the use of the area in which this accident occurred. Loading and unloading occurred in the area of the water meter cover both prior to and after the installation of the third overhead door.

No one is disputing site engineering was not performed. However, unless it is "required", it is immaterial as to what Plaintiff's engineer, Mark Hedge, may think or, for that matter, what an employee of Garden City (Robert Ruhl) may think. It is only material if the Garden City ordinances or the Uniform Building Code would have clearly required site engineering to be performed when obtaining building permits to construct overhead doors. Absent the establishment of a legal requirement for site engineering, there can be no negligence *per se* in this case that could be a proximate cause of Stem's injuries. Simply failing to obtain a building permit, where site engineering would not have been required, cannot be the basis for holding Prouty liable under a negligence *per se* theory.

CONCLUSION

The City of Garden City owned and maintained the water meter cover which is the subject of this action. Prouty did not know, nor should he have known in the exercise of reasonable care, that the water meter lid was in any way defective. When Prouty installed a third overhead door in the building in 1994, there was no requirement that site engineering be performed as part of the permitting process. Prouty is not responsible for the Plaintiff's injuries.

The District Court's ruling on summary judgment should be **AFFIRMED**. Prouty ought to be awarded costs on appeal. Prouty does not request attorney fees on appeal.

Dated this 28th day of October, 2010.

RINGERT LAW CHARTERED

James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

X	U.S. Mail, postage prepaid	( )	express Mail
( )	hand delivery	( )	facsimile

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